

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

CV 05-450-MA
CR 01-074-RE

OPINION AND ORDER

v.

CARLOS ANTONIO LOPEZ-FRANCO,
Defendant-Petitioner.

MARSH, Judge:

Petitioner, an inmate at FCI Sheridan, has filed a successive motion to correct his sentence pursuant to 28 U.S.C. § 2255. (#42)

PROCEDURAL HISTORY

On July 26, 2004, defendant filed a "Motion for Reduction of Sentence Based on New Supreme Court Case Law Enunciated in Blakely v. Washington, No. 02-1632; pursuant to 18 U.S.C. § 3582(c)(2)." (#29) On November 10, 2004, I issued an order in that case indicating that 18 U.S.C. § 3582(c)(2) was inapplicable to petitioner's case, and I ordered petitioner to advise the

court whether he wanted to: (1) withdraw his motion; (2) consent to recharacterization of the motion as Section 2255 motion; or (3) consent to the recharacterization of the motion and amend it to include any other Section 2255 claims. (#36). Petitioner did not file a response. Thus, on December 20, 2004, I recharacterized his motion as a Section 2255 motion, and denied it as untimely. (#37) I also denied petitioner's request for certificate of appealability on February 16, 2005 (#40).

On March 8, 2005, petitioner filed a request for a certificate of appealability in the U. S. Court of Appeals for the Ninth Circuit (Case No. 05-35198). While that motion was pending, on March 29, 2005, petitioner filed the present "Motion to Vacate or Correct Sentence under 28 U.S.C. 2255" in this court (#42). On April 11, 2005, petitioner filed a motion in the Ninth Circuit to withdraw his request for a certificate of appealability.

The Ninth Circuit denied all of petitioner's pending motions and requests on June 8, 2005. (#43)

DISCUSSION

A successive Section 2255 motion must be certified¹ by a panel of the Ninth Circuit Court of Appeals to contain (1) "newly

¹Pursuant to 28 U.S.C. § 2244(b)(3)(A), "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense;" or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255.

Petitioner has failed to allege or demonstrate that the Ninth Circuit has authorized this court to consider his successive Section 2255 motion. Accordingly, it is ordered that petitioner shall demonstrate in writing, within 30 days of the date of this order, that he has obtained such certification.

CONCLUSION

Petitioner shall show cause in writing, within 30 days of the date of this order, why his motion should not be denied on the basis that it is successive. Petitioner is advised that failure to show cause may result in the dismissal of this proceeding.

IT IS SO ORDERED.

DATED this 18__ day of July, 2005.

_____/s/ Malcolm F. Marsh_____
Malcolm F. Marsh
United States District Judge